

Private foundations; per diem paid to government official. A per diem allowance for travel inside the U.S. paid to a government official by a private foundation in connection with its educational and charitable purposes is excepted from the tax on self-dealing under section 4941(d)(2)(G)(vii) of the Code only if the allowance does not exceed 125 percent of the maximum authorized rate of \$35 provided by section 5702(a) of title 5, U.S.C., notwithstanding the provision in section 5702(c) allowing higher rates in designated geographical areas.

Advice has been requested whether, under the circumstances described below, a private foundation's proposed method of reimbursement of the traveling expenses of a government official would satisfy section 4941(d)(2)(G)(vii) of the Internal Revenue Code of 1954.

A government official, as defined in section 4946(c) of the Code, incurred some traveling expenses from Washington, D.C., to New York, New York, in order to participate in a 3-day symposium sponsored by the private foundation in furtherance of its educational and charitable purposes. The foundation plans to provide reimbursement of the actual cost of transportation involved plus \$50 per diem for the travel period.

Section 4941(a) of the Code imposes a tax on each act of self-dealing between a disqualified person and a private foundation.

With certain exceptions not here relevant, section 4941(d)(1)(F) of the Code provides that the term 'self-dealing' includes any direct or indirect agreement by a private foundation to make any payment of money or other property to a government official (as defined in section 4946 (c)).

However, in the case of a government official, section 4941(d)(2)(G)(vii) excepts from the term self-dealing any payment or reimbursement of traveling expenses for travel solely from one point in the United States to another point in the United States, but only if such payment or reimbursement does not exceed the actual cost of transportation involved plus an amount for all other traveling expenses not in excess of 125 percent of the maximum amount payable under section 5702(a) of title 5, United States Code, for like travel by employees of the United States.

Section 5702(a) of title 5, as amended in 1975, provides for a per diem allowance for travel inside the continental United States at a rate not to exceed \$35, but section 5702(c) permits the Administrator of General Services to prescribe conditions for reimbursement of actual expenses not to exceed \$50 per day for travel to designated high rate geographical areas. Both provisions are administered under the Federal Travel Regulations, 41 C.F.R. Part 101-7, as prescribed under section 5707 of title 5.

Such regulations provide for a maximum per diem rate of \$35 for United States employees within the continental United States with exceptions for certain designated high rate geographical areas for which maximum daily rates range from \$40 to \$50. New York, New York is a designated high rate geographical area for which \$50 is the prescribed daily maximum rate.

The specific point to resolve is whether the maximum authorized per diem rate of \$35 in section 5702(a) of title 5 is modified by the provision in section 5702(c) for designated high rate geographical areas.

At the time section 4941(d)(2)(G)(vii) of the Code was enacted, section 5702(c) of title 5 permitted the head of an agency to prescribe conditions under which an employee could be reimbursed, within certain monetary limits, for actual and necessary expenses of an official trip when the maximum per diem allowance was much less than expenses due to the unusual circumstances of the travel assignment. In the Travel Expense Amendments Act of 1975, 89 Stat. 84, Congress revised the wording of section 5702(c) and added the concept of designated high rate geographical areas. Under either version of section 5702(c), however, reimbursement is allowed, where warranted, at a rate higher than the maximum per diem rate authorized under section 5702(a).

In enacting section 4941(d)(2)(G)(vii) of the Code, Congress referred only to section 5702(a) of title 5. Thus, it intended for section 5702(a) to set the limit for the allowable reimbursement a private foundation may pay for traveling expenses. Therefore, 125 percent of \$35, the maximum daily amount payable under section 5702(a), or \$43.75, is the highest figure allowable.

Accordingly, the private foundation's proposed payment of \$50 per diem would not satisfy section 4941(d)(2)(G)(vii) of the Code.